**Industrial, Professional and Technical Workers International Union, SUINA, AFL–CIO *and* Recon Refractory & Construction, Inc. a*nd* International Union of Bricklayers *a*nd Allied Craftworkers, Local No. 4 and International Union of Bricklayers and Craftworkers, AFL–CIO.** Cases 21–CD–635 and 21–CD–637

July 24, 2003

## DECISION AND ORDER QUASHING NOTICE OF HEARING

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

This is a proceeding under Section 10(k) of the National Labor Relations Act involving a purported jurisdictional dispute. The charges were filed in Case 21–CD–635 on August 4, 2000, by Recon Refractory & Construction, Inc. (Recon) and in Case 21–CD–637 on November 16, 2000, by Local 4 of the International Union of Bricklayers and Allied Craftworkers (Local 4) alleging that Respondent Industrial, Professional and Technical Workers International Union, SUINA, AFL–CIO (IPTW) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing Recon to assign certain work to employees IPTW represents rather than to employees Local 4 represents. The two cases were consolidated, and a hearing was held on February 6, April 2–6 and 16–20, and July 9–13, 17, and 18, 2001, before Hearing Officer Tirza P. Castellanos.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

### I. JURISDICTION

Recon, a California corporation, is a general construction contractor working in areas including, but not limited to, southern California. During the 12-month period ending in July 2001, it purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

The parties stipulated, and we find, that Recon is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and Local 4 and IPTW are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE DISPUTE

#### *A. Background*

Recon's operations include the installation of different types of refractory[1] materials in various industrial units. Recon is party to a collective-bargaining agreement, called the National Refractory Agreement (NRA), with the International Union of Bricklayers and Craftworkers, AFL–CIO (BAC).[2] Under the NRA, signatory refractory contractors are required to assign refractory work to BAC-represented bricklayers.[3] Pursuant to this agreement, from 1990 through the end of 1999, Recon assigned all of its refractory work in southern California to bricklayers.

During this same time period, Recon employed laborers to perform support tasks, such as demolition, cleanup, and the mixing and transporting of refractory materials for installation by the bricklayers.[4] In 1996, Recon executed a collective-bargaining agreement with IPTW, covering Recon's laborers working at the facility of U.S. Borax. The IPTW agreement, effective from November 1, 1996, through March 1, 2002, did not expressly define the particular work encompassed by the agreement, and gave Recon unfettered discretion in the assignment of

[1] Refractories are heat-resistant materials that are used to line high-temperature furnaces, reactors, and other processing units.

[2] The NRA is executed by BAC and individual refractory contractors. BAC negotiates the agreement with a management committee of refractory contractors. The NRA's purpose is to provide refractory contractors a means to perform refractory installation work with bricklayers anywhere in the country, without the need to sign separate agreements with BAC locals in each geographic area.

[3] The NRA's work assignment provision states: "The Employer agrees to assign to employees represented by the BAC all work which has been historically or traditionally assigned to members of the International Union of Bricklayers and Allied Craftworkers, including but not limited to: dipping, setting, buttering, bedding, hanging, pointing, grouting, caulking, cutting, toothing, fitting, plumbing, aligning, laying, leveling, installing of gaskets and expansion joint materials, grinding, vibrating, tamping, guniting, pounding, insulating and spraying of all refractory materials, forming and anchoring for all refractory materials by all means including bolting and welding, ceramic welding, removal and cleaning of masonry materials to be reinstalled, final sandblasting of surfaces to receive refractory materials, installation of chemical coatings, fire-proofing, and membrane materials by any method required, surface spraying of all refractory materials, and cleaning of coke oven walls, chambers and flues."

[4] Local 4 does not claim this unskilled work, and it is therefore not in dispute in this case.

work.[5] Recon did not assign laborers to perform refractory installation work at any Recon jobsite, including U.S. Borax, at any time prior to 2000. In the spring of 1999, Recon customer Arco demanded that Recon cap its labor rates for refractory installation work. As a result, Recon commenced attempts to gain contractual wage concessions for refractory work from Local 4 and its International, BAC. Recon also gave the required notice of intent to terminate the NRA. The Unions rebuffed Recon's wage requests, and the NRA terminated on November 14, 1999. After a brief hiatus, Recon revived its contractual relationship with BAC on December 20 by executing an amended NRA, which included the same work assignment provisions for refractory installation work as in the previous NRA.

Sometime in November, Recon agreed with IPTW to extend the coverage of their extant contract to laborers working on nine additional jobsites, including the Arco site. In late January 2000,[6] Local 4 received information that Recon was performing nonbrick refractory installation work at Arco without informing Local 4, as required under the NRA. Thereafter, Local 4 representatives were denied access to the site. Local 4 filed a grievance alleging that some of the work performed at Arco in January was within the scope of work required to be assigned to bricklayers under the NRA.

On February 1, Recon's attorney sent a letter to IPTW president, Donna Walsh, enclosing a copy of Local 4's grievance and soliciting IPTW's position regarding Local 4's jurisdictional claim. The next day, Walsh replied that IPTW "claims jurisdiction over the work being performed by Recon's employees at the Arco refinery" and that IPTW would "take immediate economic action against Recon" if the disputed work were re-assigned to bricklayers. In early February, Recon owner, Dan Bellamy, informed Local 4 representatives that Recon was assigning all nonbrick refractory installation work at Arco to IPTW-represented laborers.

On June 21, BAC filed a complaint in Federal court alleging that Recon breached the NRA by assigning nonbrick refractory installation work to IPTW-represented employees. On July 31, Bellamy sent a letter to Walsh soliciting IPTW's position if Recon were to reassign the disputed work to the bricklayers. The next day, Walsh responded that IPTW would take "economic action, including picketing," if Recon did so. In response to IPTW's threats, Recon and Local 4 filed 8(b)(4)(D) charges against IPTW.

[5] The IPTW collective-bargaining agreement's work assignment provision simply states: "Work assignments shall be entirely at the discretion of the Company without regard to seniority or classification."

[6] All subsequent dates are 2000, unless otherwise stated.

### *B. Work in Dispute*

The work in dispute is the installation of various types of nonbrick refractory materials. At the hearing, the parties stipulated to the following specific statement of the nature and scope of the work in dispute:

> All refractory work performed by the Employer, including but not limited to the installation of ceramic fiber (sometimes known as Kao Wool), plastics, castables, and spray-on insulation (applied through guniting), including all bolting, welding, grinding, rigging, attaching of anchor studs, ramming, packing, forming, molding, and guniting associated with the installation of these refractories, but excluding the laying of brick, at locations including but not limited to: (1) the Arco Refinery located at 1801 East Sepulveda Boulevard, Carson, California; (2) the Mobil Refinery located at 3700 West 190th Street, Torrance, California; (3) the City of Commerce Refuse-to-Energy project in the City of Commerce; and (4) all future locations in which identical jurisdictional disputes exist.

### *C. Contentions of the Parties*

Local 4 moves to quash the notice of hearing, arguing that the dispute here involves a work preservation claim on behalf of Recon's bricklayers whom it represents rather than the kind of jurisdictional dispute appropriate for resolution through Sections 8(b)(4)(D) and 10(k) of the Act. It argues that Recon created this dispute by assigning the work traditionally performed by the bricklayers to IPTW-represented laborers in violation of the NRA. According to Local 4, Recon is therefore not the "innocent" employer, caught between two rival unions claiming the same work, for whom Congress intended to provide relief under Section 10(k). In the event the Board finds there is a valid jurisdictional dispute, Local 4 alternatively contends that the Board should award the work to the bricklayers represented by Local 4 on the basis of collective-bargaining agreements, employer past practice, area and industry practice, economy and efficiency of operations, and relative skills and training.

Recon and IPTW contend that a bona fide jurisdictional dispute is properly before the Board for resolution. They argue that the Board should award the work to IPTW-represented laborers on the basis of employer preference, relative skills and training, and economy and efficiency of operations. Recon separately argues that employer past practice favors an award to IPTW-represented employees.

### *D. Applicability of the Statute*

In determining whether a jurisdictional dispute within the scope of Section 10(k) of the Act exists, the Board

first determines whether there is reasonable cause to believe Section 8(b)(4)(D) has been violated. This requires finding, inter alia, that a union has used proscribed means to enforce its claim to the work in dispute and that it had the proscribed objective of forcing an employer to assign the work to one group of employees rather than to another group of employees. See, e.g., *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002). Viewed literally, that is what happened in this case. IPTW used means proscribed by Section 8(b)(4)(D) when it threatened to take economic action, including picketing, against Recon, and it did so for the proscribed objective of forcing Recon to assign the work in dispute to the group of employees represented by IPTW rather than the group of employees represented by Local 4.

However, the Board also looks to "the real nature and origin of the dispute" in determining whether a jurisdictional dispute exists. *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1986), affd. sub nom. *USCP-Wesco, Inc. v NLRB*, 827 F.2d 581 (9th Cir. 1987). Doing so here, we agree with Local 4 that the real dispute in this case is a contractual dispute between Local 4 and Recon over the preservation of bargaining unit work for Local 4-represented bricklayers. Such a work preservation dispute is not within the intended scope of Section 10(k) of the Act.

The Board distinguished between such a work preservation dispute and a jurisdictional dispute under Section 10(k) in *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320 (1961), where Safeway discharged employees represented by one union local, and subsequently reassigned the work they had performed to employees represented by other union locals. The reassignment was in direct violation of the collective-bargaining agreement between the former union and Safeway. The former union picketed in an effort to preserve the contractual work its members traditionally had performed. An unfair labor practice charge was filed, initiating a 10(k) proceeding. The Board concluded that Section 10(k) should not apply because the employer unilaterally created the dispute by transferring the work away from the only group previously claiming and performing it under a collective-bargaining agreement. Referring to the Supreme Court's direction that the Board must make an affirmative award of the work in dispute when a jurisdictional dispute is properly before it,[7] the Board stated:

> Implicit in this directive is the proposition that Sections 8(b)(4)(D) and 10(k) were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved. Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a "jurisdictional dispute" exists within the meaning of the cited statutory provisions.[8]

The Board applied the work preservation principle again in *USCP-Wesco*, supra, another case involving Safeway. In that case, Safeway reassigned work to a subcontractor in breach of its collective-bargaining agreement with UFCW. After the reassignment, grievances filed by UFCW against Safeway were submitted to arbitration and resolved in its favor. In response, the Teamsters, representing the subcontractor's employees, threatened to picket the subcontractor and Safeway if the work were assigned back to UFCW-represented employees. The subcontractor and the Food Employers Council, on behalf of Safeway, filed 8(b)(4)(D) charges against the Teamsters. Recognizing that "this dispute may literally fall within the terms of Sections 8(b)(4)(D) and 10(k) because there are two competing claims to the work and one of the parties threatened to picket to prevent a change in work assignment,"id. at 820, the Board nevertheless found that the real dispute was a matter of work preservation. In quashing the notice of hearing, the Board expressed the view that

> Safeway here is not the "innocent" employer that Section 10(k) was intended to protect. Safeway created this dispute by breaching its collective-bargaining agreement with UFCW and could have ended it by canceling its subcontract with Wesco. Safeway voluntarily entered into an agreement with UFCW, which included restrictions on subcontracting unit work. Shortly thereafter it nevertheless decided to subcontract unit work to Wesco. Safeway should not now be allowed to use the Board's 10(k) processes to avoid its contractual obligations. [Id. at 823.]

In sum, even though a particular dispute involving competing claims to specific work may literally fall within the terms of Sections 8(b)(4)(D) and 10(k) of the Act, the Board nevertheless will examine the nature and origins of the dispute to determine whether it is actually jurisdictional. Where a dispute is fundamentally one between an employer and a union, and concerns the union's attempt merely to preserve the work it previously had performed, the Board will not afford the employer

[7] See *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

[8] 134 NLRB at 1322.

the use of a 10(k) proceeding to resolve a dispute of its own making.

As in the above-referenced cases, the real dispute in this case is a contractual dispute between Local 4 and Recon stemming from Recon's alleged breach of the parties' agreement, and concerns Local 4's consequent efforts to preserve the work it previously had performed. Indeed, bricklayers represented by Local 4 performed the disputed work pursuant to the terms of the successive NRAs for a decade prior to January 2000. Consequently, when Recon assigned the work in dispute to IPTW-represented laborers at Arco, it was the first time that Recon had failed to assign refractory work in southern California to Local 4-represented bricklayers. Accordingly, the ensuing dispute over the work involved Local 4's attempts to preserve work traditionally performed by employees it represents under the NRA. We conclude, therefore, that the dispute here, created by Recon's alleged breach of its contract with Local 4, is a true work preservation dispute. As such, it is not appropriate for resolution under Section 10(k).

ORDER

It is ordered that the notice of hearing issued in this case is quashed.